Supreme Court, U.S.
FILED
JUN 7 -

No. 991982

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In The

Supreme Court of the United States

WILLIAM N. HYNES, JR.,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petition for Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

Petitioner Hynes was convicted in a Maryland state court proceeding of conspiracy to commit first degree murder. Hynes contested at trial the admission into evidence of his extra judicial statement made to the police while in custody. Hynes based his objection to the admission of his statement on *Edwards v. Arizona,* 451 U.S. 477 (1981).

The question, therefore, is whether the Court of Special Appeals erred in holding that the trial court did not abuse its discretion in allowing into evidence Hynes' February 14, 1996 statement to police, where Hynes had advised that he had previously consulted with an attorney and wished to call an attorney.

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CITATION TO OFFICIAL OPINIONS

The opinion by the Court of Special Appeals of Maryland, styled as *William N. Hynes, Jr., v. State of Maryland,* No. 5878, September Term, 1998, was unreported and filed on November 16, 1999. (App. 2) The Court of Appeals of Maryland denied the petition for writ of certiorari in *William Newton Hynes, Jr. v. State of Maryland,* Petition Docket No. 602, September Term, 1999, on March 9, 2000. (App. 1)

JURISDICTION STATEMENT

This is a criminal case in which petitioner timely challenged the admission into evidence in Maryland state court of his extra judicial pretrial statement on the grounds that its admission violated his rights under the Fifth and Fourteenth Amendments of the United States Constitution.

28 U.S.C. § 1257 confers upon this Court jurisdiction to review on a writ of certiorari the final judgment rendered by the highest Court of a State in which decision may be had where any right is claimed under the Constitution of the United States.

28 U.S.C. § 2101(d) provides that the time for applying for a writ of certiorari to review the judgment of a state court in a criminal case shall be as prescribed by the rules of the Supreme Court.

Rule 13 of the Rules of the Supreme Court says a petition for writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely filed when it is filed within 90 days after entry of an order denying discretionary review.

Petitioner seeks review of an unreported opinion by the Court of Special Appeals of Maryland filed on November

16, 1999. (App. 2) *William N. Hynes, Jr. v. State of Maryland*, No 5878, September Term, 1998. Petitioner had the right to seek discretionary review in Maryland's court of last resort, the Court of Appeals. His petition for a writ of certiorari to the Court of Appeals of Maryland was denied on March 9, 2000. (App. 1) *William Newton Hynes, Jr. v. State of Maryland*, Petition Docket No. 602, September Term, 1999. This petition is filed within 90 days of that date.

CONSTITUTIONAL PROVISIONS

United States Constitution, amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, amendment XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On October 29, 1994, an unknown assailant shot and killed Michael Allendorf in front of his home in Harford County, Maryland. His body was discovered at daybreak by his live-in girlfriend, Luanna Gill, and her mother, Becky Ford.

The undisputed evidence indicated that Gill's friend, Kenneth Daughton, conspired with Gill and Ford to murder Allendorf. Daughton, Gill and Ford each plead guilty to conspiracy to murder Allendorf; Daughton and Gill arranged sentences of fifty years incarceration; Ford received twenty-five years incarceration. Daughton testified at the trial of the case; Gill and Ford did not.

The State's theory was that Daughton solicited Petitioner Hynes and his severed co-defendant Benjamin Casey to have Allendorf killed. Since there were no eyewitnesses to the crime and no physical evidence linking either Hynes or Casey to the murder scene, the State posited two separate theories to the jury concerning this murder. The first theory was that Casey and/or Hynes, having accepted Daughton's contract to kill Allendorf, did the shooting themselves. The second theory was that either Casey and/or Hynes hired an unknown third person to murder Allendorf.

The State offered into evidence, over defense objection, a recorded/transcribed pretrial statement of Hynes which was obtained on February 14, 1996. In the statement, Hynes denied any role in the murder or conspiracy but admitted that he knew Casey and Daughton.

Hynes timely objected in the state court to the admission into evidence of this statement because its admission violated the dictates of *Edwards v. Arizona*, 451 U.S. 477 (1981).

ARGUMENT

THE LOWER COURT ERRED IN ADMITTING HYNES' FEBRUARY 14, 1996 STATEMENT TO THE POLICE WHERE HYNES HAD ADVISED THAT HE HAD PREVIOUSLY CONSULTED WITH AN ATTORNEY AND WISHED TO CALL AN ATTORNEY.

The issue presented in this case is of great public importance, as it addresses the question of when a defendant's own statement is admissible at trial, and requires the attention of this Court. The Court of Special Appeals reached the wrong conclusion in holding that "the police [were] not obliged to end the questioning" of Hynes when they knew that he was represented by counsel, that his counsel had advised him not to speak to the police and Hynes had indicated a desire to speak to his counsel. (App. 8)

Hynes objected to the admission of his February 14, 1996 recorded/transcribed statement and asserted that the Harford County Sheriff's Department failed to honor his desire to deal with the police only through counsel, thus violating the dictates of *Edwards v. Arizona*, 451 U.S. 477 (1981) and *Smith v. Illinois*, 469 U.S. 91 (1984). During the recorded statement the following colloquy occurred:

> H[ynes]: Exactly. I just talked to my lawyer. I mean I haven't even bothered paying a retainer because I don't need one. I told him, I called him up, I asked him a couple of questions. He said if you want my honest opinion, don't talk to the police. That's what he told me. He's like, you know, why bother. He's like don't get involved at all. I was like,

what do I have to hide, you know. I'll tell the police what I know. I was like you're welcome to hear nothing.

The police did not immediately follow up on this statement or attempt to carefully "clarify" Hynes' position on counsel. Later in the interrogation the police did make a half hearted attempt to ascertain the counsel situation.

> K[eck]: You just called him and asked him for advice. He doesn't actually represent you?
> H[ynes]: No I just called him and asked him for some advice.

Hynes, at that point, apparently disagrees with Officer Keck by answering "No" to the question: "He doesn't actually represent you?" Keck again made no attempt to clarify the apparent confusion.

However, later in the questioning, Hynes clearly states that he is represented by counsel and wishes to consult with counsel.

> H[ynes]: Well I, I mean **I'll just call my lawyer**, I mean, to be perfectly honest, I'm not going to go to jail for something I didn't do (emphasis added).

These exchanges clearly indicate that Hynes had consulted with an attorney, that the police knew that Hynes had consulted with any attorney, and that the police continued to question Hynes without "carefully clarifying" Hynes' desire to consult with his attorney before answering additional questions.

Edwards and its progeny provide that once an accused requests counsel, all questioning must cease and

officials may not reinitiate questioning until counsel has been made available to the accused. The *Edwards* requirement is not satisfied merely because an the accused has already consulted with counsel before the questioning. *Minnick v. Mississippi*, 498 U.S. 146 (1990). Thus, Hynes' statement that he had consulted with counsel does not give the police *carte blanche* authority to continue to question Hynes without carefully "clarifying" Hynes' desire to further consult with counsel during interrogation.

In *Davis v. United States*, 512 U.S. 452 (1994), the Supreme Court held that the defendant must clearly and unambiguously request counsel. In the instant case, although Hynes did not clearly, unambiguously and immediately request counsel, he, in his own in artful way, made it known to the questioning authorities that he had an attorney who had provided him with legal advice about the murder investigation and that he wished to call his lawyer. The Court has acknowledged that, "a suspect need not speak with the discrimination of an Oxford don," *Davis*, 512 U.S. at 459, and recommended:

> Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney.

Davis, 512 U.S. at 461.

Under the circumstances in this case, the police should have carefully "clarified" and then "scrupulously honored" Hynes' desire to consult with counsel. The failure to do so makes the admission of the recorded/transcribed statement reversible error.

This Court should exercise its discretionary jurisdiction because both law enforcement and the public would greatly benefit by a clear enunciation from this Court

as to the rights and responsibilities of parties to a police/citizen interrogation. Police interrogations involving counsel requests occur on a daily basis throughout the United States and, therefore, certiorari is necessary.

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Dated: June 13th 2000

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IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 602
September Term, 1999
(No. 5878, Sept. Term, 1998,
Court of Special Appeals)

WILLIAM NEWTON HYNES, JR. *

v. *

STATE OF MARYLAND *

ENTERED: MARCH 9, 2000

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, the conditional cross-petition and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and conditional cross-petition be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

DATE: MAR 09, 2000

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
No. 5878
September Term, 1998

WILLIAM N. HYNES, JR.,

v.

STATE OF MARYLAND

Wenner,
Salmon,
Thieme,
JJ.

Opinion of Wenner, J.

ENTERED: November 16, 1999
FILED: November 16, 1999

Appellant, William N. Hynes, Jr., was convicted by a jury in the Circuit Court for Harford County of conspiracy to commit murder and sentenced to a term of life, with all but forty years suspended.[1] On appeal appellant presents us with the following questions:

1. Whether the lower court erred in admitting Hynes' February 14, 1996 statement to the police where Hynes had advised that he had previously consulted with an attorney and wished to call an attorney?
2. Whether the lower court erred in admitting other crimes, wrongs, or acts evidence where such evidence was used to merely show Hynes' propensity to commit murder?
3. Whether the lower court erred in allowing identification testimony where such testimony was the result of any impermissibly suggestive photo display?

Finding no error, we shall affirm the judgment of the circuit court.

Facts

In the early morning of 29 October 1994, at about 2:40 a.m., Michael Allendorf (Allendorf) was shot dead in

[1] In November 1996, appellant was convicted by a jury in Harford County of first degree murder and conspiracy to commit murder and sentenced to life without parole. On appeal, we reversed and remanded for a new trial in an unreported opinion, ***Hynes v. State***, No. 457, Sept. Term 1997 (filed December 12, 1997). This is an appeal from appellant's conviction at his second trial, at which he was found not guilty of first degree murder.

front of his Joppatowne home. His body was discovered at daybreak by his live-in girlfriend, Luanna Gill (Gill), and her mother, Becky Ford (Ford). It is undisputed that Gill and Ford conspired with one Kenneth Daughton (Daughton) to commit the murder, and Gill and Ford plead guilty to conspiracy to commit murder.[2]

Daughton testified that he first met Gill when she was a waitress in a restaurant which he frequented. At first, Daughton would give Gill money to pay her bills and gifts for her son. Eventually, Gill confided in Daughton that she was involved in an abusive relationship with her boyfriend, Allendorf. Daughton ultimately offered to help Gill escape from her relationship with Allendorf. According to Daughton, Gill not only began talking of having Allendorf murdered, it evolved into her persistently "harassing" him to arrange for the murder. Daughton explained that he, Gill and Ford had for a period of time, plotted Allendorf's murder. Daughton had approached several persons to murder Allendorf. Or, as Daughton put it, to have Allendorf "blown up" or shot.

Daughton eventually discussed this plan with appellant and Benjamin Casey (Casey),[3] who agreed to murder Allendorf. Daughton twice met with appellant and Casey to discuss the murder. At the first meeting, appellant and Casey received $1,000 from Daughton, with the understanding that they were to receive an additional $1,000 after Allendorf was killed. Gill obtained a .12 gauge shotgun owned by Allendorf and placed it in a secluded spot outside of the house. The weapon was then retrieved by Daughton. On Friday, 28 October 1994, Daughton met with the miscreants and gave them the shotgun. Daughton also pointed out to them locations frequented by Allendorf on

---

[2] Gill and Daughton each received 50 year sentences and Ford received one 25 year sentence. Daughton testified against appellant, but Gill and Ford did not.

[3] Casey and appellant were friends with Daughton's daughter, Christine.

Friday nights. Appellant and Casey were to follow Allendorf to those locations on that evening.

While Daughton, Gill, Ford, and Gill's son were having dinner that evening, Daughton was paged by Casey on three occasions. These pages were returned using Gill's credit card. On the first call, Daughton was assured by Casey that, "Everything was okay, not to worry." On the second call, Casey informed Daughton that they had "lost [Allendorf]" and wanted directions to a club to which Allendorf may have gone. On the third call, Casey told Daughton that Allendorf would be killed that night in front of Allendorf's home. Daughton heard no more from Casey that evening. The following morning, Daughton learned that Allendorf had been killed in front of his home early Saturday morning. Allendorf had been killed with one shot to the head from a .12 gauge shot gun.

Telephone record revealed that on Friday evening, Casey had paged Daughton from Pat's Café and from a local lumber company. Mark Dickinson testified that he recalled having seen appellant once at "Johnny's Suspicion's," now know as Pat's Café. Angela Cahill had been a waitress at Pat's Cafe, and she testified that she had previously seen appellant at Pat's Cafe.

We shall add such additional facts as we deem necessary while discussing the issues.

Discussion

II.

Appellant first claims that his 14 February 1996 statement to police should not have been admitted into evidence because his request for an attorney had not been honored by the police, citing ***Edwards v. Arizona***, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981). We disagree.

After having been fully advised of his rights, appellant had agreed to cooperate with police and had given

them two statements. In addition, appellant had agreed to accompany the officers to several locations. Moreover, on neither of these occasions was appellant under arrest. According to appellant, during his second interview, he informed the detective that he and an attorney and wished him to be present during his interview.

Writing for us in ***Wallace v. State***, 100 Md. App. 235, 237-38, 640 A.2d 749 (1994), Judge Moylan said:

> As interpreted by ***Edwards*** and its progeny, once a defendant indicates, even half-heartedly or equivocally, his desire for the presence of an attorney, all interrogation must cease until an attorney is provided. If a defendant spontaneously reconsiders the matter and initiates further contact with the police, indicating that he had changed his mind, that would be an effective waiver. If it is the police, on the other hand, who reinitiate or continue discussion, there will be no weighing or balancing. The waiver will be deemed invalid.

Edwards and its progeny, however, involve situations in which the accused clearly asked for an attorney. ***David v. U.S.,*** 512 U.S. 452, 114 S. Ct. 2350, 129 L.Ed. 362 (1994). We reviewed ***Davis*** in ***Matthews v. State,*** 106 Md. App. 725, 666 A. 2d 912 (1995), in which Matthews, the accused had been represented by counsel in another matter. During questioning on an unrelated matter, Matthews said, "Where's my lawyer?" ***Id.*** In ***Matthews***, Judge Cathell wrote:

> The language used by Mr. Matthews of where is my lawyer?; I determine that to be an inquiry. That is not a request for an attorney. For the police to have something on which to rely to consider it to be [a] reasonable demand

> for a lawyer it has to sound like a request or a demand for a lawyer.

Id. at 733-34. Thus, we concluded that Matthews had not asked for an attorney, and his statement had been properly obtained by the police. In arriving at that conclusion, we quoted extensively from ***Davis***:

> The applicability of the "'rigid' prophylactic rule" of ***Edwards*** required courts to "determine whether the accused actually invoked his right to counsel." ... [T]his is an objective inquiry... But if a suspect makes a reference to any attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents to not required that cessation of questioning...
>
> Rather, the suspect must unambiguously request counsel...
>
> ...[W]hen the officers...reasonably do not know whether... the suspect wants a lawyer, a rule requiring the immediate cessation of questioning "would transform the ***Miranda*** safeguards into wholly irrational obstacles to legitimate police investigation activity"...
> ...
>
> Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney .... But we decline to adopt a rule requiring officers to

> ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.
>
> ... [W]e are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.

Matthews, 106 Md. App. at 737-38 (quoting ***Davis***, 512 U.S. at 458-62) (citations and footnote omitted).

In the case *sub judice*, the trial court concluded, "We have reviewed Mr. Hynes statement in light of the holdings of the appellate courts in ***Matthews*** and ***Davis***. We conclude that at no time did Mr. Hynes request an attorney during his questioning." We agree.

The reference to an attorney in appellant's statements are neither ambiguous nor equivocal. Appellant said that he had talked to an attorney, who had told him not to talk to the police. Despite this advise, appellant said he still wanted to talk to the police. Appellant said he had nothing to hide and said clearly that he did not need a lawyer. The following portion of appellant's statement clearly demonstrates his intent to talk to police:

> I just talked to my lawyer. I mean I haven't even bothered paying a retainer because **I don't need one**. I told him. I called him up. I asked him a couple of questions. He said if you want my honest opinion, don't talk to police. That's what he told me. He's like, you know, why bother. He's like don't get involved at all. I was like, **what do I have to hide**, you know. **I'll tell the police what I**

know. I was like your welcome to hear nothing. (Emphasis added.)

Nonetheless, appellant now insists that he "clearly [stated] that he [was] represented by counsel and [wanted] to consult with counsel." As we see it to the contrary, we do not believe that the police were obliged to end the questionsing.[4] Accordingly, there was no error.

II.

Appellant also contends that evidence of his prior bad acts should not have been admitted. Specifically, appellant challenges admission of a taped statement in which he admitted entering bars while still a juvenile. According to appellant, admission of such evidence could lead to the inference that he was disposed to commit murder. For two reasons, we do not agree.

First, appellant failed to preserve this issue for our review. Maryland Rule 4-323(a) provides: "An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." As we have pointed out, for an appellant's "objections to be timely made and thus preserved for our review, defense counsel either would have had to object each time a question... was posed or to request a continuing objection to the entire line of questioning." ***Brown v. State***, 90 Md. App. 220, 225, 600 A.2d 1126 (1992), ***See Snyder v. State***, 104 Md. App. 533, 558, 657 A.2d 342 (1995).

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[4] Nor do we agree with appellant that his comment, "Well, I mean I'll just call my lawyer" was a request for an attorney. Appellant had just been informed by the police, "You ain't very far away from going behind bars." His response indicated that he would call his lawyer if he was arrested.

Although appellant objected, two witnesses testified as to his frequenting such bars. On direct examination, Mark Dickinson said during the following colloquy:

> [Prosecutor]:
>
> Where did you recognize William Hynes from?
>
> A: I had seen him in Johnny Suspicions once.
>
> Q. Johnny Suspicions.
>
> A. Yeah. It's now Pat's Cafe.
>
> ...
>
> Q. Do you remember what the Defendant was doing that time you saw him in Johnny Suspicions?
>
> A. Socializing.
>
> Q. What type of place was Johnny Suspicions?
>
> A. It was more of a biker bar than it is now. Almost older people. There are younger people there now.

Not only was there no objection to this line of questioning, but the witness was cross examined by defense counsel as follows:

> [Defense Counsel]:
>
> At the time you frequented this establishment known as Johnny's Suspicions'; is that correct?
>
> A. Yes.
>
> Q. It was in Johnny Suspicions' in 1992 that on one occasion you had a recollection of seeing my client there; is that correct?
>
> A. Yes.
>
> Q. One time in 1992?

A. Yes.

Q. You have described it as a biker bar at the time or was it a dancing establishment?

A. You could dance, but there was quite a few bikers would come in there. We would have to take off our leather jackets. We had to wear our tank tops.

Similarly, on direct examination Ms. Cahill explained that she was employed at Pat's Cafe, an establishment she described as a "country western bar." When asked, "Where do you recognize the defendant from?" she responded, "Pat's Cafe." She said she remembered having seen him shooting pool. Not only did defense counsel not object, he cross-examined Ms. Cahill on the subject.

As we have noted in both ***Snyder*** and ***Brown***, "when an appellant makes a timely objection, but fails to object at subsequent points in the proceedings, an objection is deemed waived." ***Snyder***, 104 Md. App. at 557. Hence, the issue has not been preserved for our review.

Had it been preserved, however, it would have been of no avail to appellant. His reliance on Rule 5-404 is misplaced. Rule 5-404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

The Court of Appeals recently addressed what constitutes bad acts evidence in ***Klauenberg v. State***, 355 Md. 528, 735 A. 2d 1061 (1999), and said:

> In reviewing the holdings from other jurisdictions and examples of what those courts have construed or not construed as bad acts, the general theme running through each is that a bad act is an activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit. It is from this general proposition that we evaluate whether the evidence to which appellant protests as erroneously admitted were bad acts under Maryland Rule 5-404(b).

Id. at 549. In ***Klauenberg***, the accused had been convicted of solicitation to commit murder, and evidence had been admitted of his aggressive behavior and his possession of guns. ***Id.*** Under the circumstances of the case, the Court of Appeals did not consider it to be evidence of bad acts. ***Id.*** at 551. There was no error.[5]

III.

Appellant finally claims identification testimony should not have been admitted because it was the result of an impermissibly suggestive photo display. Detective Keck exhibited to Ms. Cahill several 8 ½" x 11" photographs, and asked Ms. Cahill is she recognized anyone. Ms. Cahill said she recognized appellant, explaining that she remembered having seen appellant in Pat's Cafe and at The Loft, a package goods store. She remembered that appellant had been in an argument with someone at the pool tables in Pat's Cafe. She also remembered that she had seen appellant in

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[5] Consequently, we need not address the ***Faulkner*** test to determine the admissibility of such evidence. ***State v. Faulkner***, 314 Md. 630, 634-35, 552 A.2d 896 (1989).

the parking lot at The Loft. She had subsequently identified appellant both in a line-up conducted by the Sheriff's Department and in court during the trial. Appellant believes these identifications should have been excluded.

"In challenging the admission of extra-judicial identification, 'the defense has the initial burden of showing some unnecessary suggestiveness in the procedures employed by the police.'" ***Aiken v. State***, 101 Md. App. 557, 572, 647 A.2d 1229 (1994) (quoting ***Brockington v. State***, 85 Md. App. 165, 172, 582 A.2d 568 (1990)). "[A] pretrial identification of a defendant is normally admissible... unless it was unconstitutionally obtained or is so unreliable as to violate due process." ***Barrow v. State***, 59 Md. App. 169, 186-87, 474 A.2d 967 (1984)(footnote omitted).

Appellant has failed to carry his initial burden. We find nothing unnecessarily suggestive in the photo display. As we have said, Detective Keck exhibited several photographs to Ms. Cahill and asked, "Do you recognize anyone?" He did not inquire as to any specific event, date or location, only whether she recognized anyone. Ms. Cahill not only recognized appellant, she recalled specific details about when and where she had seen him. Again, there was no error.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.